Sheree Kaur Sidhu v Jagjeet Singh Sandhu a/l Harjit Singh

HIGH COURT (PENANG) — DIVORCE PETITION NO 33–365 OF 2011
WONG TECK MENG JC
29 JULY 2015

Civil Procedure — Affidavit — Rebuttal — Failure to rebut or challenge averments in affidavit — Whether amounted to admission

Family Law — Children — Custody — Application for variation of custody order — Application for leave to take child out of jurisdiction to live with applicant (mother) overseas — Applicant remarried to foreigner and relocating overseas — Whether compelling reasons shown — Whether child comfortable with proposed relocation — Whether in best interest of child

By a consent order dated 25 January 2012 entered before the High Court judge, the applicant/petitioner's and the respondent's marriage was dissolved and the custody, care, control and guardianship of the child of the marriage Celinna Kaur Sandhu ('Celinna') was given to the applicant with access to the respondent. The applicant now applied for an order that she be given leave to take Celinna out of the jurisdiction of the court to live together with the applicant overseas. The applicant had in her affidavit in support stated that the applicant had since married to one Tobias Boeckeler ('Tobi'), a German national who was working as an expatriate engineer under contract in Penang since 2012. Tobi had been offered new employment in Germany and therefore the applicant and Tobi had to move to Germany. The applicant prayed for leave to take Celinna along with them. The applicant's affidavit had set out facts relating to the close and happy relationship Celinna was having with her and Tobi as a new family. Celinna too had expressed her happiness with the prospect of continuing her schooling in Germany and living with the applicant in Germany. Tobi had forged a unique loving relationship akin to a parental relationship with Celinna. On the other hand, the mental health of the respondent was a cause of concern for the applicant as there was evidence that the respondent had been admitted in the hospital for psychiatric treatment. The applicant had in her affidavit set out numerous incidents of violence by the respondent to the person of the applicant and to her property, some of them in the presence of Celinna. The issue for the court to determine was whether the applicant should be allowed to take Celinna out of Malaysia to Germany while the respondent, the natural father of the child, continued to live in Malaysia.

Held, allowing the said application with no order as to costs:

(1) The respondent did not file an affidavit to rebut or challenge the averments in the affidavit of the applicant. Hence, the court took notice that averments in the applicant's affidavit had been admitted by the respondent; *Ng Hee Thong v Public Bank Bhd* [1995] 1 MLJ 281 at p 286 referred (see para 18)

(2) The reasons as stated in the supporting affidavit were extremely compelling to allow the applicant to take Celinna out of Malaysia to Germany. Ever since the applicant married Tobi in August 2014, Celinna had been living with them as a family unit happily. Her stepfather Tobi has been very caring and loving towards Celinna and in all aspects had performed his responsibilities as a dutiful father to her. Without a doubt, Celinna was able to bond with her stepfather as well as being loved by the applicant (see paras 19–20).

(3) The paramount consideration is the child's welfare. Celinna had now become a member of a new family and it was the happiness and security of that family which her welfare depended upon. Any refusal to allow the applicant to take Celinna to Germany was likely to impact detrimentally on Celinna's welfare (see paras 24–25).

(4) The applicant having guardianship, custody, care and control of Celinna vested in her by the High Court should be allowed to choose a reasonable manner how she should live her life after divorce (see para 26).

[Bahasa Malaysia summary

Melalui perintah persetujuan bertarikh 25 Januari 2012 yang dimasuki di hadapan hakim Mahkamah Tinggi, perkahwinan pemohon/pempetisyen dan responden telah dibatalkan dan hak penjagaan, jagaan, kawalan dan penjaga anak perkahwinan Celinna Kaur Sandhu ('Celinna') telah diberikan kepada pemohon dengan hak akses kepada responden. Pemohon kini memohon untuk perintah bahawa dia diberi kebenaran untuk mengambil Celinna luar daripada bidang kuasa mahkamah untuk tinggal bersama pemohon di luar negara. Pemohon dalam afidavit sokongannya telah menyatakan bahawa pemohon telah sejak itu berkahwin dengan Tobias Boeckeler ('Tobi'), seorang warganegara Jerman yang bekerja sebagai jurutera ekspatriat di bawah kontrak di Pulau Pinang sejak 2012. Tobi telah ditawarkan pekerjaan baru di Germany dan oleh itu pemohon dan Tobi telah berpindah ke Germany. Pemohon memohon untuk kebenaran mengambil bersama Celinna dengan mereka. Afidavit pemohon telah menyatakan fakta berkaitan hubungan rapat dan bahagia Celinna bersamanya dan Tobi sebagai keluarga baru. Celinna juga menyatakan dia gembira dengan prospek menyambung pelajarannya di Germany dan tinggal dengan pemohon di Germany. Tobi telah menjalinkan hubungan kasih sayang seperti hubungan ibubapa dengan Celinna. Sebaliknya, kesihatan mental responden adalah penyebab yang menjadi kerisauan pemohon kerana terdapat keterangan bahawa responden telah

dimasukkan ke hospital untuk rawatan psikiatrik. Pemohon dalam afidavitnya telah menyatakan pelbagai kejadian keganasan oleh responden kepada pemohon dan kepada hartanahnya, yang beberapanya berlaku dalam kehadiran Celinna. Isu untuk ditentukan oleh mahkamah adalah sama ada pemohon sepatutnya dibenarkan mengambil Celinna keluar Malaysia ke Germany sedangkan responden, bapa kandung anak itu, terus tinggal di Malaysia.

Diputuskan, membenarkan permohonan tersebut tanpa perintah untuk kos:

(1) Responden tidak memfailkan afidavit untuk mematah atau mencabar penegasan dalam afidavit pemohon. Justeru, mahkamah mengambil perhatian bahawa penegasan dalam afidavit pemohon telah diterima oleh responden; *Ng Hee Thong v Public Bank Bhd* [1995] 1 MLJ 281 di ms 286 dirujuk (lihat perenggan 18).

(2) Sebab-sebab seperti dinyatakan dalam afidavit sokongan amat meyakinkan untuk membenarkan pemohon untuk mengambil Celinna keluar Malaysia ke Germany. Sejak pemohon berkahwin dengan Tobi pada Ogos 2014, Celinna telah tinggal bersama mereka sebagai sebuah unit keluarga yang bahagia. Bapa tirinya Tobi amat mengambil berat dan sayang terhadap Celinna dan dalam semua aspek telah melaksanakan tanggungjawabnya sebagai bapa yang bertanggungjawab kepadanya. Tanpa diragui, Celinna dapat menerima bapa tirinya dan juga disayangi oleh pemohon (lihat perenggan 19–20).

(3) Pertimbangan utama adalah kebajikan anak itu. Celinna kini telah menjadi ahli keluarga baru dan ia adalah kebahagiaan dan keselamatan keluarga tersebut yang mana kebajikannya bergantung. Apa-apa keengganan untuk membenarkan pemohon membawa Celinna ke Germany kemungkinan akan memberi kesan yang memudaratkan ke atas kebajikan Celinna (lihat perenggan 24–25).

(4) Pemohon yang diberikan hak penjaga, hak penjagaan, jagaan dan kawalan ke atas Celinna oleh Mahkamah Tinggi hendaklah dibenarkan untuk memilih cara munasabah bagaimana dia patut menjalani kehidupannya selepas bercerai (lihat perenggan 26).]

Notes

For cases on affidavit in general, see 2(1) *Mallal's Digest* (5th Ed, 2015) paras 406–622.

For cases on custody, see 8(2) *Mallal's Digest* (5th Ed, 2015) paras 3815–3871.

Cases referred to

Chamberlain v de la Mare (1983) 4 FLR 434 (refd)
Kades v Kades (1961) 35 ALJR 251, HC (refd)
Low Swee Siong v Tan Siew Siew and other appeals [2013] 3 MLJ 247, CA (refd)

A *Nash v Nash* [1973] 2 All ER 704, CA (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281, CA (refd)
Payne v Payne [2001] EWCA Civ 166, CA (refd)
Teh Eng Kim v Yew Peng Siong [1977] 1 MLJ 234, FC (refd)

B **Legislation referred to**

Law Reform (Marriage and Divorce) Act 1976 ss 96, 101

KC Lim (Hisham Yoong) for the petitioner.
(Yagoo & Assoc) for the respondent.

C

Wong Teck Meng JC:

INTRODUCTION

D **[1]** By a consent order dated 25 January 2012 entered before the High Court judge, the petitioner's and the respondent's marriage was dissolved and the custody, care, control and guardianship of the child of the marriage Celinna Kaur Sandhu was given to the petitioner with access to the respondent.

E **[2]** This is an application dated 15 April 2015 by the petitioner ('the applicant') for the following orders:

(a) the applicant be given leave to take her minor child, Celinna Kaur Sandhu out of the jurisdiction of this Honourable to live together with
F the applicant overseas;

(b) the respondent's right of access given by this court in the consent order of 25 January 2012 be varied; and henceforth each occasion the applicant returns to Malaysia with Celinna Kaur Sandhu, especially
G during her long summer break, the applicant shall divide equally the time spent by Celinna in Malaysia between the respondent and the applicant's family;

(c) the respondent be given access to Celinna through Skype or telephone every fortnightly on Saturdays and Sundays between 9am–5pm at the
H local time of the applicant; and

(d) arrangements for access shall be by consent of the parties and any variation of access proposed by any party shall be informed to the other party with reasonable notice.

I in pursuant to ss 96 and 101 Law Reform (Marriage and Divorce) Act 1976.

[3] The orders sought in the application are to vary a part of consent order dated 25 January 2015 which is:

It is ordered that the petitioner be granted custody, care and control and guardianship of the child of the marriage, Cellina Kaur Sandhu; and the Respondent be granted access to the child fortnightly over alternative weekends between 1.00 pm–2.00pm on Fridays up to 5.00 pm–6.00 pm on Sundays; and for half of the school holidays and public holidays. The arrangements for access are made by mutual consent; and any proposed variation by one party is to be communicated to the other party with sufficient notice. For the purposes of access, the child should be fetched from and returned to the Petitioner's home by an adult member of the Respondent's family.

[4] The affidavit in support affirmed by the applicant dated 15 April 2015 sets out the grounds for the application which may be summarised thus:

(a) last August 2014, the applicant married Tobias Boeckeler, a German national. A copy of marriage certificate is exhibited as 'SB3' in the affidavit in support;

(b) the applicant's husband, Tobias Boeckeler, ('Tobi') has been working as an expatriate engineer under contract in Penang since 2012;

(c) sometime in March 2015, well before the expiry of his contract in Penang, Tobi became aware of, and he applied for, a vacant position in a MNC in Germany which more suited his specialty in medical engineering. His application was successful;

(d) on 31 March 2015 he received the official letter of appointment, and he confirmed his acceptance of the appointment on 2 April 2015;

(e) Tobi's new employers need him to commence his employment with them as soon as possible. Thus, Tobi needs to leave for Germany with his family comprising the applicant and her daughter Cellina in early May 2015;

(f) the applicant has resigned from her post as senior manager with B Braun Industries Sdn Bhd with effect 1 May 2015 in order that she may follow her husband, Tobi, to Germany and set up a home there for her family comprising herself, Tobi and Celinna Kaur Sandhu ('Cellina');

(g) Cellinna has expressed her happiness with the prospect of continuing her schooling in Germany and living with the applicant in Germany;

(h) since the marriage of the applicant to Tobi in August 2014, the applicant together with Tobi and her daughter Celinna have lived together as a happy family;

(i) as a matter of fact, the three of them have been living together happily since May 2014, ie, after betrothal of the applicant with Tobi in April 2014;

(j) during this period of time, the applicant's husband, Tobi, has forged a unique loving relationship akin to a parental relationship with the minor child Celinna;

(k) a graphic illustration of this loving 'parental' relationship is shown in the exhibits marked as 'SB4(1)-SB4(44)' comprising photographs of activities of this new family unit comprising the applicant, Tobi and the minor child Celinna;

(l) all three of them have been on vacation trips together both locally and overseas, they often make outdoor weekend trips together, fishing, boating in the sea around Penang and Pangkor, they have been to Vietnam, Germany, Switzerland and France on vacation together;

(m) Celinna is always included in the social activities of the applicant and Tobi as a couple whenever and wherever it is possible to take a child;

(n) apart from leisure type activities, the applicant's husband has been giving Celinna lessons in German, helping her with her homework, especially mathematics, teaching her cycling, swimming, inculcating in her a love for nature, animals, etc;

(o) Celinna is very comfortable with the applicant's family and also his extended family comprising grandparents, cousins, brothers, nephews and nieces. And she is loved dearly by all especially the applicant's father-in-law and mother-in-law;

(p) Celinna has been to Tobi's home in Schramberg, Germany and has visited his relatives and friends. Celinna has sat in with her new friends at their school in Switzerland and seen for herself what the school life is like there; and

(q) Celinna has shown in so many ways that she is capable of adapting to life in Germany and to complete her schooling there successfully, inter alia, by reason of:

(i) Celinna is presently in year three class of an international school, ie the Straits International School in Bayan Lepas, Penang;

(ii) in this school Celinna has had the opportunity to interact with children from many nations with divers cultural backgrounds;

(iii) Celinna's class teacher is an Australian national;

(iv) teaching in this school is based on an international curriculum;

(v) many of the photographs exhibited as SB4(4)-S4(44) in the affidavit in support show how confident and comfortable Celinna is in the company Tobi's immediate and extended family and his friends;

(vi) since September 2014 Celinna has been tutored in German language, initially by a qualified lecturer from USM and now by Tobi;

(vii) Tobi's home in Schramberg, Germany, offers spacious and comfortable accommodation for Celinna, Tobi and applicant;

(viii) Celinna would have her own room complete with all the facilities including heating system. See exh SB4(31)(B) in the affidavit in support;

(ix) there is an elementary school, ie, 'Grundschule Sulgen' located less than a kilometre from Tobi's home which would suit Celinna well;

(x) Celinna has recently lived in Tobi's house during her school holidays;

(xi) Celinna had no problems interacting with Tobi's immediate and extended family as well as his friends; and

(xii) and as stated earlier, Celinna has expressed her happiness to live with the applicant in Germany.

[5] In addition, the applicant intends to use two previous affidavits used in this divorce petition which are affidavit in support affirmed by the applicant dated 25 April 2011 (encl 7) and affidavit in reply affirmed by the applicant dated 12 August 2011 (encl 13).

[6] Furthermore, the petitioner has stated in her affidavit in support that should this application be disallowed by this court, the consequences would be very bad for all of them, including the respondent. The reasons being:

(a) the applicant would be forced to live a separate existence from her husband for the reason he must leave Malaysia soon to comply with the conditions of his visa upon the termination of his contract with effect from 1 May 2015; and he must begin working for his new employers in Germany soon, as per their requirement;

(b) this will surely have a very adverse effect on the applicant's marriage, it would permanently harm the harmony and happiness of this new family unit comprising Celinna, Tobi and the applicant. It could probably lead to a marital breakdown;

(c) on the other hand, the applicant, being solely vested with the guardianship, custody, care and control of Celinna, pursuant to a consent order of this court dated 25 January 2012, cannot leave Celinna here alone, and set up a home with her husband in Germany. The responsibility for the care and upbringing of Celinna lies solely with the

applicant. The applicant would like to fulfil this responsibility in an environment of love and affection;

(d) in a few years Celinna would reach of the age of puberty and would need her mother's love, her mother's companionship, her mother's guidance for her emotional development and to build up her confidence in herself;

(e) the respondent is not a suitable person at all to, and would not be able, to bring up Celinna until she attains the age of majority. The reasons for the applicant's standpoint are more fully set out in her affidavit in reply affirmed on 12 August 2011 ('encl 13'). These may be summarised thus:

(i) the applicant stated then that this honourable court, in deciding the issue of reasonable access of Celinna to the respondent, has to take in consideration the mental health of the respondent and his propensity to commit acts of violence in the presence of the child as stated in the several subparagraphs to para 4 in the affidavit in support which is marked as encl 7 herein;

(ii) the mental health of the respondent is a cause of concern for the applicant. From her enquiries then from his family members, his colleagues at his place of work, and from calls by her and her lawyers to the Jabatan Psikiatri & Kesihatan Mental, Hospital Pulau Pianng she gathered information that the respondent was initially admitted in the Adventist Hospital for psychiatric treatment on 26 April 2011;

(iii) subsequently, on 29 April 2011 he was transferred to Jabatan Psikiatri & Kesihatan Mental, Hospital Pulau Pinang where he was confined behind bars until he was released on 29 May 2011;

(iv) the applicant stated that she has no idea what the present mental state of the respondent is, and whether he is faithfully taking the medication prescribed for him to control his violent behavior;

(v) in her affidavit in support affirmed on 25 April 2011, which is marked as encl 7 herein, in paras 4–5 at pp 4–24, the applicant has set out numerous incidents of violence to the person of the applicant and to her property, some of them in the presence of Celinna. These displays of violence, aggression and hostility to the applicant in the presence of Celinna have caused serious distress to the applicant and Celinna. Exhibits SKS4, SKS6, SKS8, SKS9, SKS10, SKS11 and SKS12 comprise of police reports made by the applicant for acts of violence to her person, damage to her property, her unlawful confinement, etc;

(vi) see also exh 'SKS16' and averments thereto concerning illegal confinement paras 5.18–5.20 at pp 19–20, exhs SKS17 and SKS18 and averments thereto concerning injury to the person of the

applicant, damage to her car, by the respondent at paras 5.27–5.30 at pp 22–23 in encl 7;

(vii) all these acts of the respondent resulted in protection order dated 28 March 2011 being issued by the local magistrates' court which is exhibited as 'SKS13' in encl 7;

(viii) the applicant expressed her fears for the safety of Celinna while she is out with the respondent due to this propensity for insolent and aggressive behaviour in public; and

(ix) even after the service of ex parte injunctions dated 3 May 2011 and the interim protection order dated 28 March 2011 issued by the magistrate at Mahkamah Majistret, Balik Pulau, the respondent was not deterred and cause damage to the applicant's car, a copy of the relevant police report is marked as 'SKS20' in encl 7.

[7] Finally, the applicant states in her affidavit that if her application is allowed by the court, Celinna's access to the respondent, her natural father would not in effect cease for the following reasons:

(a) modern technology offers many indirect means of communication which are both effective and affordable to maintain her access to the respondent;

(b) furthermore, the applicant, on her trips back to Malaysia with Celinna to visit her parents, and her siblings, especially during Celinna's long school breaks, would divide the time Celinna is here in Malaysia fairly and equally between respondent and her own family members who reside here; and

(c) the applicant has family ties and property in Penang which she wishes to maintain and retain through visits as frequent as possible subject to financial constraints and work commitments.

ISSUE

[8] Whether the applicant should be allowed to take Celinna out of Malaysia to Germany while the respondent, the natural father of the child, continues to live in Malaysia.

The law on taking a child out of jurisdiction

[9] In view of the consent orders made by the court in the consent order of 25 January 2012, the relevant provision applicable here is s 101 Law Reform (Marriage and Divorce) Act 1976. Section 101, inter alia, reads:

101(1) The Court may on the application of the father or mother of a child :

A (b) Where under any agreement or order of Court, one parent has the custody of the child to the exclusion of the other may give leave for such child to be taken out of Malaysia either conditionally or subject to such condition or such undertaking as the Court may think fit.

B **[10]** Leave for the child to be taken out of the local jurisdiction lies with the discretion of the court and the paramount consideration must be the welfare of the child.

[11] In the Federal Court case of *Teh Eng Kim v Yew Peng Siong* [1977] 1
C MLJ 234, the issue was, inter alia, whether upon divorce the wife could take her children to Australia as she intended to marry an Australian national. The court below had decided that the welfare of the children could be best served if she had the custody, care and control of the children and was able to take them to Australia. Upon appeal by the husband the Federal Court stated at
D pp 239–240:

> The position as I see it, is to disregard entirely any concept of parental claim. As the welfare of the children is the paramount consideration, the welfare of these children prevails over parental claim.

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[12] At p 240 the Federal Court noted that:

> In a situation such as the present one, when one parent has been given custody, and it is working well, it is a very wrong thing for this court to make an order which will interfere with the life style of the new family unit. Of course, one sympathises with
F the father, but it is one of those things which he must face when the marriage break up. Perhaps a short quotation from the judgment of Sachs LJ in *P (LM) v P(GE)* is apposite:
>
> > When a marriage breaks up, then a situation normally arises when the child of that marriage, instead of being in the joint custody of both parents must of
G necessity become one who is in the custody of a single parent. Once that position has arisen and the custody is working well, this court should not lightly interfere with such reasonable way of life as is selected by that parent to whom custody has been rightly given. Any such interference may, Winn LJ, has pointed out, produce considerable strains which would be unfair not only to the parent whose
H way of life is interfered with but also to any new marriage of the parent. In that way it might well in due course reflect on the welfare of the child.
>
> The way in which the parent who properly has custody of a child may choose in a reasonable manner to order his or her way of life is one of those things which the parent who has not been given custody may well have to bear, even though one has
I every sympathy with the latter on some of the results.

[13] In the recent case of *Low Swee Siong v Tan Siew Siew and other appeals* [2013] 3 MLJ 247 at p 263 the Court of Appeal in considering an application by one parent to take her daughter out of jurisdiction to United

Kingdom, reiterated the paramount consideration principle as follows:

> With regard to the question whether the Judicial Commissioner was right in allowing Enclosure (110) in granting leave to take the child out of jurisdiction, it is settled law that in applications such as this, the paramount consideration is, what is the best interests and welfare of the child.

[14] At this juncture, I would also wish to refer to the English case of *Payne v Payne* [2001] EWCA Civ 166 which has been cited with approval in our courts where the English Court of Appeal cited with approval the case of *Chamberlain v de la Mare* (1983) 4 FLR 434 where at p 445 ('*de la Mare* case') Lord Justice Griffiths said this:

> The welfare of young children is best served by bringing them up in a happy, secure family atmosphere. When, after divorce, the parent who has custody of the children remarries, those children then join and become members of a new family and it is the happiness and security of that family on which their welfare will depend. However painful it may be for the other parent that parent has got to grasp and appreciate the fact. If a step-father, for the purpose of his career, is required to live elsewhere the natural thing would be that he will wish to take his family, which now includes step-children with him he is faced with alternative of going and leaving the family behind which is a very disruptive state of affairs and likely to be very damaging to those step-children or alternatively he may have to throw up his career prospects and remaining this country. If he has to do that he would be less than human if he did not feel a sense of frustration and, do what he may, what may well spill over into a sense of resentment against the step-children who have so interfered with his future career prospects. If that happens it must reflect upon the happiness and possibly even the stability of this second marriage. It is to that effect that the court was pointing in the decisions of *Poel v Poel* and *Nash v Nash* and it was stressing that it was a factor that had to be given great weight when weighing up the various factors that arise when a judge has to decide whether or not to give leave to take children out of jurisdictions.

[15] In *de la Mare*'s case, the mother of two children (nine and seven years old) who had obtained custody of them following her divorce sought permission to take the children to the United States. Since the divorce she had re-married and had a child by her new husband, who wished to live in the United States for business reasons. The court there decided to allow the application of the mother by emphasising that the welfare of the children is the paramount consideration and ruled that to prevent the parent with custody from emigrating may cause a deep sense of bitterness and frustration which may have a damaging effect on them.

[16] In *Nash v Nash* [1973] 2 All ER 704, where the mother had divorced her husband was granted custody of the child had wanted to leave the United Kingdom for South Africa in order to take up a teaching post in a university and also to bring her child along.

[17] The Court of Appeal affirmed the decision of High Court which granted leave to the mother to take the child out of the jurisdiction despite strong objections from the child's father whose reasons, inter alia, (i) the child might be infected and even indoctrinated with the country's racialist doctrines … (iii) that he might not be admitted into the country to see the child because of his strong views on its racialism expressed in his writings. Davies LJ at p 706 states that:

> But I emphasise once more that when one parent has been given custody it is a very strong thing for this court to make an order which will prevent the following of a chosen career by the parent who has custody.

DECISION

[18] This application and its supporting affidavit were served on the respondent on 15 April 2015 but the respondent did not file an affidavit to rebut or challenge the averments in the affidavit of the applicant. On the hearing dated of 5 May 2015, counsel of respondent argued that the child should not be taken out of jurisdiction but instead should remain with him as he is able to take care of her. Based on *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 at p 286 which held that:

> It is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact asserted.

[19] Hence, I will take notice that averments in the applicant's affidavit have been admitted by the respondent. Bearing in mind the legal principles involved in this case, the reasons as stated in the supporting affidavit are extremely compelling to allow the applicant to take Celinna out of Malaysia to Germany.

[20] Ever since the applicant married Tobi in August 2014, Celinna has been living with them as a family unit happily. Her stepfather Tobi has been very caring and loving towards Celinna and in all aspects have performed his responsibilities as a dutiful father to her. Without a doubt, Celinna is able to bond with her stepfather as well as being loved by the applicant.

[21] Now that Tobi is going back to his home country to take up a job there and he wants his family to be with him and the applicant as a dutiful wife has decided to leave her job here and to follow him. Celinna who has been with the applicant and under her loving care since her birth until now at age seven years plus must necessarily follow her mother to Germany where she continues to be loved and taken care of by her mother, and of course her stepfather Tobi. It is gainsaid that a young girl should have the love, care and attention of the child's mother and that her upbringing should be the responsibility of her mother, if

it is not possible to have responsibility of both parents living together (see *Kades v Kades* (1961) 35 ALJR 251). A

[22] As Tobi has been exemplary and magnanimous in his love also for Celinna, it is an additional bonus for her as she now enjoys a very balanced family life. It is uncommon for a stepfather to show much love and care for her, despite the fact that Celinna is not his own child. B

[23] I can only see a bright future for the three of them living happily in Germany and that Celinna will be well brought up there in all aspects of family life. In fact, both the applicant and Tobi have ably prepared Celinna for her life in Germany and it is a fact that she will be able to adjust to the environment, culture and life there. C

[24] The paramount consideration is the child's welfare and I have no doubt that Celinna should follow her mother there. I should encourage this new family unit to develop and prosper its lifestyle to its fullest potential instead of making an order that interferes with it. Celinna has now become a member of a new family and it is the happiness and security of that family which her welfare will depend. D E

[25] If the order applied for by the applicant is not granted, Tobi has to leave the family behind and this would disrupt the new family's current state of affairs and would likely damage their lives, and as a consequence thereof Celinna. If the applicant were to remain here while her husband moves back to Germany alone, it would impose numerous financial constraints of maintaining two households and the travelling expenses involved. Hence, any refusal to allow the applicant to take Celinna to Germany is likely to impact detrimentally on Celinna's welfare. F G

[26] The applicant having guardianship, custody, care and control of Celinna vested in her by the High Court should be allowed to choose a reasonable manner how she should live her life after divorce. I have also considered the right of access of the respondent to the child and with that in mind, made such orders as are also fair to him. H

[27] Hence, based on the above reasons, I allowed the said application with no order as to costs. The terms of the order granted by me are as follow:

(a) IT IS ORDERED that the petitioner be granted leave to take her natural child, Celinna Kaur Sandhu, out of the jurisdiction of this court to live with her overseas; I

(b) IT IS ORDERED that the access rights of the respondent, pursuant to the order of this court dated 25 January 2012, be varied; and henceforth

A the petitioner shall return to Malaysia at least once every three years, and each time the petitioner returns to Malaysia access for Celinna Kaur Sandhu, for the period of time the petitioner is in Malaysia, shall be divided equally between the respondent and the petitioner's family.

B (c) IT IS ORDERED that if the respondent accompanied by his mother visits Celinna Kaur Sandhu in Germany, the respondent shall be given reasonable access to Celinna Kaur Sandhu and be allowed to take Celinna to stay with him for the period of time the respondent and his mother are in Germany;

C (d) IT IS ORDERED that after Celinna Kaur Sandhu has attained the age of 13 years, if she wishes to visit the respondent in Malaysia she may do so subject to the second order above, and all the flight and travelling expenses shall be borne by the respondent;

D (e) IT IS ORDERED that the respondent be given reasonable access to Celinna Kuar Sandhu every week on Saturdays and Sundays either by telephone, Skype or other live modern communication means between the hours of 9am to 5pm at the local time of the petitioner;

E (f) IT IS ORDERED that arrangements for all access shall be made by consent of both parties and any proposed variation by one party shall be communicated to the other party with reasonable notice; and before the petitioner returns to Malaysia she shall give reasonable notice to the respondent before access is given;

F (g) IT IS FURTHER ORDERED that the petitioner be at liberty to apply; and

(h) AND LASTLY IT IS ORDERED that there be no order to costs.

Appeal allowed with no order as to costs.

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Reported by Kanesh Sundrum

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